Supreme Court, U.S.
FILED
OCT 22 2015
OFFICE OF THE CLERK

No. 14-1175

IN THE
Supreme Court of the United States

FRANCHISE TAX BOARD
OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF FOR RESPONDENT

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October 23, 2015

QUESTIONS PRESENTED

1. Whether States have immunity as of right – rather than immunity as a matter of comity – in the courts of other States.

2. Whether petitioner has shown a "special justification" for setting aside principles of stare decisis and overruling *Nevada v. Hall*, 440 U.S. 410 (1979).

3. Whether the Full Faith and Credit Clause requires Nevada state courts to apply California's laws of sovereign immunity to a matter over which Nevada has legislative jurisdiction.

4. Whether the voluntary doctrine of comity requires Nevada state courts to apply California's laws of sovereign immunity when the Nevada courts have decided that it would be contrary to Nevada's sovereign interests to do so.

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INTRODUCTION

Now that this case has returned to the Court, the Board's principal argument turns out to be one that it did not even bother to make on the first go-round: that States have complete immunity as a matter of right in other States' courts. But the history of immunity among independent sovereigns – as the States once were and largely are today – flatly contradicts that theory. The relevant history shows unmistakably that, at the time of the Founding, sovereigns were not entitled to immunity as of right in other sovereigns' courts, but received immunity only as a matter of comity (i.e., with the consent of the home sovereign). *See Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). Nothing in the Constitution or plan of the Convention altered that preexisting balance between different sovereigns. Furthermore, the Court has already rejected the Board's immunity-as-of-right argument in *Nevada v. Hall*, 440 U.S. 410 (1979), relying on the careful analysis of competing sovereign interests set forth in *Schooner Exchange*, and the Board offers no "special justification" for suddenly dispensing with that established precedent. Thus, whether the Court now reexamines the States' immunity as an original matter or simply adheres to *Hall* under traditional principles of stare decisis, the result is the same: States do not have immunity as of right in other States' courts. The States are free to obtain that immunity through mutual agreement, but they have no right to insist upon immunity over the objection of the forum sovereign.

The Board's alternative argument, a convoluted attempt to exploit a Nevada law capping damages for Nevada officials, is similarly unavailing. Although

the Board has modified its previous position that Nevada courts must apply California law granting total immunity to the Board – limiting it now to awards above the amount of the Nevada cap – its new argument, like the old one, runs head-on into the controlling Full Faith and Credit Clause standard, which permits a State to apply its own law whenever it is "competent to legislate" about the subject matter of the suit. *See Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488, 494 (2003) ("*Hyatt I*") (internal quotations omitted). The Court has already found that Nevada satisfies that standard in this case, *see id.*, and it is undisputed that Nevada law does not limit damages for out-of-state officials. Furthermore, the Board offers no authority for the illogical proposition that federal courts can *order* States to give "equal treatment" to other States as a matter of comity. It has been understood for centuries that granting comity is a voluntary act on a sovereign's part, and that doctrine thus provides no basis for the Board to forcibly elevate its own sovereignty over that of Nevada. The judgment below should be affirmed.

STATEMENT

1. The issues in this case arise out of a state-law tort suit, one of several disputes between respondent and petitioner California Franchise Tax Board. The original dispute stemmed from a residency tax audit initiated by the Board with respect to the 1991 and 1992 tax years. The principal issue in the tax matter involves the date that respondent, a former California resident, became a permanent resident of Nevada. Respondent contends that he became a Nevada resident in late September 1991, shortly before he received significant licensing income from

certain patented inventions. The Board has taken the position that respondent became a resident of Nevada in April 1992. The tax dispute remains the subject of ongoing proceedings in California.

The present suit concerns certain tortious acts committed by the Board against respondent. The evidence at trial showed that Board auditor Sheila Cox, as well as other employees of the Board, went well beyond legitimate bounds in their attempts to extract a tax settlement from Mr. Hyatt. Referring to respondent, the auditor declared that she was going to "get that Jew bastard." JA259, 265. According to testimony from a former Board employee, the auditor freely discussed personal information about respondent – much of it false – leading her former colleague to believe that the auditor had created a "fiction" about respondent. JA261, 263-65.

The auditor also sought out respondent's Nevada home, peering through his window and examining his mail and trash. JA267. After she had closed the audit, she boasted about having "convicted" respondent and returned to his Nevada home to take trophy-like pictures. JA253-55. The auditor's incessant discussion of the investigation conveyed the impression that she had become "obsessed" with the case. JA261, 267-68.

Within her department, Ms. Cox pressed for harsh action against respondent, including rarely issued fraud penalties. JA263. To bolster this effort, she enlisted respondent's ex-wife and estranged members of respondent's family. *E.g.*, JA208-09, 213-23. And she often spoke coarsely and disparagingly about respondent and his associates. JA259-61, 265-67.

The Board also repeatedly violated promises of confidentiality. Although Board auditors had agreed

to protect information submitted by respondent in confidence, the Board bombarded people with information "Demand[s]" about respondent and disclosed his address and social security number to third parties, including California and Nevada newspapers. *E.g.*, JA224-45, 263. Demands to furnish information, naming respondent as the subject, were sent to his places of worship. JA238-41, 243-45. The Board also disclosed its investigation to respondent's patent licensees in Japan. JA247-51.

The Board knew that respondent, like many inventors, had significant concerns about privacy and security. JA242. Rather than respecting those concerns, however, the Board sought to use them to pressure him into a settlement. One Board employee pointedly warned Eugene Cowan, an attorney representing respondent, about the necessity for "extensive letters in these high profile, large dollar, fact-intensive cases," while simultaneously raising the subject of "settlement possibilities." JA277-78. Both Cowan and respondent himself understood the employee to be pushing for tax payments as the price for maintaining respondent's privacy. JA272, 274-75.

2. Respondent brought suit against the Board in Nevada state court, alleging both negligent and intentional torts. In response, the Board asserted that it was entitled to absolute sovereign immunity. Although this Court had held that a sovereign has no inherent sovereign immunity in the courts of a co-equal sovereign, *see Nevada v. Hall*, 440 U.S. 410 (1979), the Board argued that the Full Faith and Credit Clause required Nevada to give effect to California's own immunity laws, which allegedly gave the Board full immunity against respondent's state-law claims.

The Nevada Supreme Court rejected the Board's argument that it was obligated to apply California's law of sovereign immunity. JA167-68. Nevertheless, the court extended significant immunity to the Board as a matter of comity. While the court found that "Nevada has not expressly granted its state agencies immunity for all negligent acts," JA168, it noted that "Nevada provides its agencies with immunity for the performance of a discretionary function even if the discretion is abused," JA169. It thus concluded that "affording Franchise Tax Board statutory immunity [under California law] for negligent acts does not contravene any Nevada interest in this case." JA168.

The Nevada Supreme Court declined, however, to apply California's immunity law to respondent's intentional tort claims. The court first observed that "the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy." JA167. It then determined that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." JA169. The court pointed out that "Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment." JA166 & n.10, 169, citing *Falline v. GNLV Corp.*, 823 P.2d 888 (Nev. 1991). Against this background, the court declared that "greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency." JA169.

This Court, in a unanimous opinion, affirmed. *See Hyatt I.* Rejecting the Board's argument that the Full Faith and Credit Clause required Nevada courts to apply California's immunity laws, the Court reiterated the well-established principle that the Full Faith and Credit Clause does not compel "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." 538 U.S. at 494 (internal quotations omitted). Applying that test, the Court found that Nevada was "undoubtedly 'competent to legislate' with respect to the subject matter of the alleged intentional torts here, which, it is claimed, have injured one of its citizens within its borders." *Id.*

The Court noted that it was "not presented here with a case in which a State has exhibited a 'policy of hostility to the public Acts' of a sister State." *Id.* at 499, quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955). To the contrary, the Court noted, "[t]he Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Id.*

3. At trial, the jury found the Board liable for a variety of intentional torts, ranging from fraud to invasion of privacy. It awarded respondent a total of $139 million in compensatory damages and $250 million in punitive damages.

The Nevada Supreme Court, for the most part, reversed. In doing so, it reduced the Board's liability for compensatory damages to approximately $1 million (pending a retrial on damages with respect to one claim). And it held that, as a matter of comity,

the Board was immune from any award of punitive damages.

Reviewing the merits, the Nevada Supreme Court determined that respondent had not established necessary elements for various torts under Nevada law. *See* Pet. App. 25-38. The court, however, affirmed the portion of the judgment based on fraud. The court noted evidence that, despite its promises of confidentiality, the Board had "disclosed [respondent's] social security number and home address to numerous people and entities and that [the Board] revealed to third parties that Hyatt was being audited." *Id.* at 40. The court also pointed to evidence that "the main auditor on Hyatt's audit, Sheila Cox, . . . had made disparaging comments about Hyatt and his religion, that Cox essentially was intent on imposing an assessment against Hyatt, and that [the Board] promoted a culture in which tax assessments were the end goal whenever an audit was undertaken." *Id.* The court thus determined "that substantial evidence supports each of the fraud elements." *Id.* at 41.

Having upheld liability on the fraud claim, the Nevada Supreme Court next considered whether it should apply a statutory damages cap applicable to Nevada officials – a condition on Nevada's waiver of sovereign immunity – to the Board. *See* Nev. Rev. Stat. § 41.035(1). The court decided that "comity does not require this court to grant [the Board] such relief." Pet. App. 45-46. The court pointed out that officials from other States are not similarly situated to Nevada officials with respect to intentional torts because Nevada officials "'are subject to legislative control, administrative oversight, and public accountability in [Nevada].'" *Id.* at 45, quoting *Faulkner v. University of Tennessee*, 627 So. 2d 362, 366 (Ala.

1992). As a result, "'[a]ctions taken by an agency or instrumentality of this state are subject always to the will of the democratic process in [Nevada],'" while out-of-state agencies like the Board "'operate[] outside such controls in this State.'" *Id.*, quoting *Faulkner*, 627 So. 2d at 366. Considering this lack of authority over other States' agencies, the court concluded that "[t]his state's policy interest in providing adequate redress to Nevada citizens is paramount to providing [the Board] a statutory cap on damages under comity." *Id.*

With respect to respondent's intentional infliction of emotional distress claim, the Nevada Supreme Court affirmed the jury's finding of liability – noting that respondent had "suffered extreme treatment" at the hands of the Board (*id.* at 50) – but it reversed the award of damages. Finding errors with respect to the introduction of evidence and instructions to the jury, the court determined that the Board was entitled to a new trial to establish the proper level of damages. *Id.* at 51-62. It remanded the case to the trial court for that purpose.

Finally, as a matter of comity, the Nevada Supreme Court reversed the award of punitive damages. The court stated that, "under comity principles, we afford [the Board] the protections of California immunity to the same degree as we would provide immunity to a Nevada government entity as outlined in NRS 41.035(1)." *Id.* at 65. The court then added: "Because punitive damages would not be available against a Nevada government entity, we hold that under comity principles [the Board] is immune from punitive damages." *Id.*

SUMMARY OF ARGUMENT

I. The States do not have immunity as of right in the courts of other States. This Court so held in *Nevada v. Hall*, 440 U.S. 410 (1979), and the relevant historical evidence shows that its decision was correct.

A. This Court has given great weight to "history and experience, and the established order of things, . . . in determining the scope of the States' constitutional immunity from suit." *Alden v. Maine*, 527 U.S. 706, 727 (1999) (internal quotations omitted). Here, an examination of that "history and experience" reveals three critical facts: *first*, that, prior to formation of the Union, the States had the status of independent nations and thus had the same sovereign immunity in each others' courts as other nations had in the courts of foreign nations; *second*, that the immunity enjoyed by one nation in the courts of another nation was *not* an immunity as of right, but an immunity that depended on the express or implied consent of the home sovereign; and, *third*, that, insofar as sovereign immunity among the States was concerned, the Formation did not change either the scope or the nature of that preexisting immunity.

The idea that immunity between sovereigns depends on the consent of the home sovereign is anything but novel. To the contrary, it has been understood for centuries that immunity among different sovereigns is grounded in, and derived from, fundamental principles of sovereignty itself. *See Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). As Chief Justice Marshall explained in *Schooner Exchange*, "[t]he jurisdiction of [a] nation within its own territory is necessarily exclusive and absolute" and "is susceptible of no limitation not imposed by itself." *Id.*

at 136. It would be directly contrary to that understanding for a foreign sovereign to unilaterally grant itself immunity from the jurisdiction of the home sovereign and its tribunals. It follows, therefore, that "[a]ll exceptions . . . to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself." *Id.* And that consent, having been given, can be withdrawn, at least with suitable notice, at any point in the future. *See id.* at 146.

The Board repeatedly disregards this critical principle, failing even to mention *Schooner Exchange*. To make its argument, the Board first assumes that sovereigns had universal immunity as of right in pre-Formation times and then asserts that formation of the Union left that immunity unchanged. But that gets matters backwards. Because the States did not have immunity as of right during their time as independent sovereigns, the proper question is whether formation of the Union *granted* them such immunity, thereby diminishing the States' preexisting "exclusive and absolute" jurisdiction over their own territory.

The clear answer is that it did not. To begin with, it is well-recognized that formation of the Union did not strip the States of their sovereign status. Although the States necessarily ceded some of their powers to the federal government, they nevertheless "entered the federal system with their sovereignty intact." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). That residual sovereignty, in turn, left the States with broad powers to govern with respect to persons and events within their territory. Given how jealously the States guarded their sovereign powers, it is highly unlikely that the States would

have surrendered part of those powers – without saying a word about it – in favor of allowing other States to operate with impunity within their borders.

The Board does not, in fact, claim that the States engaged in any such surrender. Rather, having committed to its States-always-had-immunity-as-of-right theory, the Board tries to shore up that position by relying on general statements by various founding fathers and on dicta in 19th Century cases, all of which broadly declare that sovereigns are not amenable to suit even in courts of other sovereigns. But none of the Board's quoted material directly addresses the critical issue: whether immunity between sovereigns existed as of right or was dependent on consent of the home sovereign. Moreover, if the various statements are taken to mean that sovereigns have (and always have had) immunity as of right wherever they go, then those statements would be in direct conflict with the principles of sovereignty recognized in *Schooner Exchange*, one of this Court's seminal decisions. Despite its newfound willingness to urge overruling of cases, even the Board does not suggest that *Schooner Exchange* should be cast aside.

The Framers' remarks about sovereign immunity were also directed to a very different issue: whether the States would have immunity in the new federal courts. The States, of course, had good reason to be concerned about lack of such immunity. Not only did the language of Article III suggest that the States would be subject to suit, but, because the federal government was to be established as a *superior* sovereign, the States could not count on the mutuality of self-interest that was (and is) the bedrock of comity-based immunity among equal sovereigns. In setting up this new government, therefore, the States

wanted the same immunity that they enjoyed in their own courts – i.e., immunity as of right – and that is the subject the Framers were addressing. There is no comparable indication that the States were willing, or indeed felt any need, to trade part of their sovereignty for the same immunity in the courts of other States. That immunity remained a matter of comity on the part of the home State.

B. The historical evidence, properly understood, demonstrates that the States did not, and do not, have immunity as of right in each others' courts. But, even if the evidence were less certain, the Court should reach the same conclusion as a matter of stare decisis. The decision in *Hall* rejected the very same argument the Board makes here, and the Board has offered no "special justification" for overruling it. *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (internal quotations omitted).

The Board's attack on *Hall* – in addition to being wrong – is noticeably thin. First of all, it is remarkable that the Board makes no effort to confront the core principles set forth in *Schooner Exchange*, even though *Schooner Exchange* was the principal authority on which *Hall* rested. Furthermore, to the extent the Board questions the reasoning of *Hall*, it mostly walks in the tracks of Justice Rehnquist's dissent in that case, relying heavily on the same Framers' statements and case citations that Justice Rehnquist discussed. And, while the Board purports to find an inconsistency between *Hall* and this Court's post-*Hall* decisions, the notion that those cases undermined *Hall* founders on the fact that none of the decisions even discussed, let alone disavowed, the principles of *Schooner Exchange*. That is hardly surprising given that none of the cases required the

Court to assess the competing interests of two equal sovereigns.

The Board also offers little evidence that *Hall* has caused grave problems for the States. Although lawsuits against States in state courts arise occasionally, they remain infrequent and are often dismissed on the basis of comity between States. Indeed, as a telling sign that such cases are of minimal concern, the Board did not even bother to challenge *Hall* on its previous trip to this Court. There is little reason to think, therefore, that overruling *Hall* is critical, or even particularly important, to effective operation of state governments.

The need to overrule *Hall* is also diminished by the fact that the States have other, more effective ways to gain sovereign immunity in each others' courts. Unlike the typical "constitutional" decision, *Hall* leaves the States free to obtain expanded immunity through normal political channels. In particular, the States can enter into agreements to provide immunity on a reciprocal basis, as various *amicus* briefs indicate that States are willing to do. Because such voluntary agreements would not aggregate state power at the expense of the federal government, they would not require Congress's approval. *See Cuyler v. Adams*, 449 U.S. 433, 440 (1981). And the process of full discussion among the States would allow all branches of state governments to participate in the politically sensitive decision to surrender part of the States' sovereignty (and their citizens' right to secure relief) in exchange for guarantees of greater immunity in other States' courts.

Voluntary agreements among the States would also give the States an opportunity to define the scope of immunity they want to obtain and provide. Indeed,

one of the distinct oddities of the Board's position is that the immunity it seeks – total immunity for any and all actions, no matter what kind or how destructive – bears almost no resemblance to modern sovereign immunity. Thus, for example, the United States, which once granted other nations almost complete immunity for their actions in this country, now provides broad exceptions to that immunity for, among other things, commercial activities and certain torts. Agreements among the States would allow them to consider similar exceptions for state-to-state immunity, rather than accepting the across-the-board immunity that would result from overruling *Hall*. Thus, whether reaffirmed on its own terms or simply given respect as a matter of stare decisis, the decision in *Hall* should stand.

II. The Board's less sweeping submission – that Nevada should be ordered to apply its state-law damages cap to California officials – fails as well. Although the Board makes a roundabout argument that, under the Full Faith and Credit Clause, the Nevada courts had to apply *California's* law of total immunity to damages greater than *Nevada's* cap, this argument, apart from being a strange mishmash of California and Nevada law, is foreclosed by the governing Full Faith and Credit Clause standard. That standard provides, in simple terms, that a State may apply its own law to matters about which it is "competent to legislate." *Hyatt I*, 538 U.S. at 494 (internal quotations omitted). The Court has already found that the Nevada courts can apply Nevada law in this case, and it is undisputed that Nevada law does not provide a damages cap for out-of-state officials.

The Board tries to get around that problem by insisting that Nevada cannot exhibit "hostility" to California law. But that argument suffers from its own flaws. To begin with, it cannot be "hostile" as a constitutional matter for Nevada to do exactly what the Constitution permits it to do: apply its own law where it has legislative jurisdiction. Furthermore, the Board's attempt to add a "no hostility" test to the current Full Faith and Credit Clause standard would be a practical disaster, embroiling the Court in repeated, largely standardless inquiries into whether an otherwise constitutional choice-of-law decision crossed some unidentifiable "hostility" threshold. Finally, and in any event, it is pure hyperbole to say that the Nevada courts were hostile to California law (or even to California itself), when the Nevada Supreme Court granted the Board complete immunity for its negligent actions, prohibited any award of punitive damages against the Board, reversed the damages award on one tort claim because it rested on matters properly left to California's tax proceeding, and even carefully explained why it had decided not to limit compensatory damages for injuries caused by the Board's abusive actions. Far from showing hostility, the Nevada court took full and respectful account of the Board's sovereign status at every step.

The Board's attempt to create a federal doctrine of "mandatory state-to-state comity" is even less convincing. As has been true for centuries, comity is a *voluntary* doctrine, and the decision by one sovereign to grant comity to another sovereign ultimately lies within its discretion. It is thus entirely unsurprising that the Board cites no case – not one – saying that federal courts can tell state courts how to apply the doctrine of comity. Recognition of such a

power in the federal courts would, in fact, be a wholly inexplicable transfer of power from the States to the federal government.

Finally, the Board tries to fashion an equal-treatment argument out of principles of "equal sovereignty," suggesting that, by not applying the Nevada damages cap to California officials, Nevada somehow denied California its right to constitutionally based equality. In doing so, however, the Board has wrenched the "equal sovereignty" principle from its proper moorings. In its true form, the doctrine of equal sovereignty operates to assure that each State has the same powers within *its* territory as other States have within *their* territory. The doctrine does not mean – and could not mean without lapsing into incoherency – that every State has the same powers in *other* States as the home State does. The Board's continuing attempt to import its own sovereignty into Nevada thus falls of its own weight.

ARGUMENT

I. States Do Not Have Sovereign Immunity as of Right in the Courts of Other States.

A. The Historical Evidence Shows That Immunity Between Sovereigns Depends Upon Consent of the Home Sovereign.

This Court has traditionally looked to "'history and experience, and the established order of things,' . . . in determining the scope of the States' constitutional immunity from suit." *Alden v. Maine*, 527 U.S. 706, 727 (1999), quoting *Hans v. Louisiana*, 134 U.S. 1, 14 (1890). To undertake that inquiry properly, however, it is essential to identify the precise form of sovereign immunity at issue. As we discuss, the history underlying a sovereign's immunity in its own courts is different from, and grounded in less complex consider-

ations than, the history of a sovereign's immunity in the courts of another independent sovereign. It is the latter immunity, not the former, that is at issue here.

The history of immunity among independent sovereigns makes quite clear that States do not have immunity as of right in the courts of other States. That conclusion follows from three basic points: *first*, that, prior to formation of the Union, the States were independent sovereign nations and had the same immunity in each others' courts as other sovereign nations had in the courts of foreign nations; *second*, that, before the Formation (as now), sovereign nations could not assert immunity as of right in the courts of other nations, but enjoyed immunity only with the consent of the host nation; and, *third*, that nothing in the Constitution or formation of the Union altered that balance among the still-sovereign States, giving priority to the rights of visiting States at the expense of host States. As a result, the Board does not have sovereign immunity as of right in Nevada's courts.

1. Prior to Formation of the Union, the States Were Independent Sovereign Nations.

This Court has frequently recognized that, following the Declaration of Independence, the States had the status of independent sovereign nations. In *McIlvaine v. Coxe's Lessee*, 8 U.S. (4 Cranch) 209 (1808), for example, the Court observed that "the several states which composed this union, so far at least as regarded their municipal regulations *became entitled*, from the time when they declared themselves independent, *to all the rights and powers of sovereign states*." *Id.* at 212 (emphases added). Thus, "each of them was a sovereign and independent

state, that is, . . . each of them had a right to govern itself by its own authority, and its own laws, without any control from any other power on earth." *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 224 (1796). Many years later, the Court again confirmed that the States "were then sovereign states, possessing, unless thus restrained [i.e., by the Articles of Confederation], all the rights and powers of independent nations over the territory within their respective limits." *Wharton v. Wise*, 153 U.S. 155, 166 (1894).

Both the Declaration of Independence and the Articles of Confederation set forth the States' sovereignty in plain terms. For its part, the Declaration of Independence stated "[t]hat these United Colonies are, and of Right ought to be Free and Independent States." Declaration of Independence para. 4 (1776). Article II of the Articles of Confederation then provided that "[e]ach state retains its sovereignty, freedom, and independence, . . . which is not by this confederation expressly delegated to the United States." Art. of Confederation, art. II (1781). And, while the Articles of Confederation did "delegate[]" a portion of the States' newly asserted sovereignty to "the United States," the Articles did not address, and did nothing to alter, the nature of the immunity that the States, as independent nations, had in each others' courts.

The Board does not question the historical status of the States as independent nations. *See* FTB Br. 30 (acknowledging such independence). Nor does it argue that, during their existence as independent nations, the States were entitled to *greater* sovereign immunity than other nations. The Board's immunity claim depends entirely on the proposition that, during the period after the Declaration of Independence and before formation of the Union, independent

nations had immunity as of right in the courts of other nations. As we discuss next, that proposition is simply incorrect.

2. Independent Sovereigns Enjoy Immunity in Other Sovereigns' Courts Only with the Consent of the Home Sovereign.

In the late 18th Century, independent nations did not have immunity as of right in the courts of other sovereigns. To the contrary, they enjoyed immunity only with the consent of the host nation.

This Court set forth that fundamental principle in *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). In that case, two citizens of the United States filed an action against the Schooner Exchange – a French ship of war – claiming they were the rightful owners of the ship and demanding its return. At the time of the action, the warship was docked in the port of Philadelphia, having encountered severe weather and needing repairs. *See id.* at 118 (Statement). The plaintiffs' suit thus directly raised the question whether France, in order to protect its ship from seizure, was entitled to claim sovereign immunity in the courts of the United States.

Recognizing that the case raised a potential conflict between two sovereigns, Chief Justice Marshall carefully examined the authority of the United States as the host sovereign and of France as the visiting sovereign. Relying on "general principles" and "a train of reasoning," *id.* at 136, the Chief Justice explained how the competing sovereign interests were to be reconciled. Importantly for present purposes, he first set forth the guiding principle that "[t]he jurisdiction of [a] nation within its own territory is necessarily exclusive and absolute" and "is susceptible

of no limitation not imposed by itself." *Id.* Given that background understanding, it followed that a foreign nation could not unilaterally claim immunity from the home nation's jurisdiction, because that restriction, "deriving validity from an external source, would imply a diminution of [the home nation's] sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power [i.e., the foreign nation] which could impose such restriction." *Id.* In the Court's view, that proposition was incompatible with the inherent nature of sovereignty itself.

The Court then announced a second critical principle, one that proceeded from the first: that any immunity enjoyed by a foreign nation must stem from the consent of the home nation. As the Court stated, "[a]ll exceptions . . . to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself." *Id.* That consent could be either express or implied, and was presumed to be freely given, *id.*, but it remained the prerogative of the home sovereign to withdraw that consent – with suitable notice (*see id.* at 137) – if its own sovereign interests so dictated. *See id.* at 146.

The principles set forth in *Schooner Exchange* have long been the foundation of sovereign immunity among nations. Just a decade after that decision, this Court, speaking through Justice Story, emphasized its rejection of the "notion that a foreign sovereign had an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign, when it came within his territory; for that would be to give him sovereign power beyond the limits of his own empire." *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 352 (1822).

The Court reiterated that the immunity of a foreign sovereign, and of his property, within the territory of an independent sovereign "stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations, that foreign public ships coming into their ports, and demeaning themselves according to law, and in a friendly manner, shall be exempt from the local jurisdiction." *Id.* at 353. And it made clear that, "as such consent and license is implied only from the general usage of nations, it may be withdrawn upon notice at any time, without just offence, and if afterwards such public ships come into our ports, they are amenable to our laws in the same manner as other vessels." *Id.*

In the ensuing centuries, this Court has repeatedly reaffirmed the basic principle that immunity in another sovereign's courts depends upon the latter's consent. In *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), the Court stated plainly that "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Id.* at 486. Subsequently, in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), the Court, after noting that *Schooner Exchange* "is generally viewed as the source of our foreign sovereign immunity jurisprudence," *id.* at 688, confirmed that "the jurisdiction of the United States over persons and property within its territory 'is susceptible of no limitation not imposed by itself,' and thus foreign sovereigns have no right to immunity in our courts," *id.*, quoting *Schooner Exchange*, 11 U.S. (7 Cranch) at 136. Insofar as foreign sovereigns enjoy immunity in United States courts, therefore, they do so "as a matter of comity," *id.*, not

absolute entitlement. *See also Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2255 (2014).

Far from seeking to discredit or explain away the principles of *Schooner Exchange*, the Board does not even refer to that decision. For supporting case law, it relies instead on a pre-Formation Pennsylvania Court of Common Pleas decision declining to hear a suit against the Commonwealth of Virginia. *See Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (1781). But *Nathan* is entirely consistent with *Schooner Exchange*'s view that immunity among independent sovereigns is a matter of comity. There, Pennsylvania's Attorney General, acting at the direction of the Supreme Executive Council of Pennsylvania, urged the state court to accord immunity to Virginia, much as attorneys for the United States urged this Court to accord immunity to France in *Schooner Exchange*. *See* 11 U.S. (7 Cranch) at 120-26, 132-35 (Statement). That intercession not only preserved Virginia's dignity by removing the need for it to make an appearance but, importantly, expressly signified Pennsylvania's consent to Virginia's claim of immunity.

3. Formation of the Union Did Not Change the Nature of the States' Immunity in Each Others' Courts.

The historical evidence thus demonstrates that, prior to formation of the Union, the States did not have immunity as of right in the courts of other States. Like other independent nations, they were entitled to immunity only with the express or implied consent of the host sovereign. The remaining question, then, is whether the Formation altered that allocation of authority among sovereigns, stripping the host sovereign of its power to withhold consent if it deemed immunity to be incompatible with its own

sovereign interests. The short answer is that it did not.

The Board, in fact, does not even advance such an argument. Putting all its eggs in the States-already-had-immunity-as-of-right basket, the Board makes no attempt to show that, even if that hypothesis is wrong, the formation of the Union subsequently eliminated the need for the home sovereign's consent. That reticence is for good reason: there is no historical evidence to show that any such reduction in state sovereignty took place.

a. To begin with, formation of the United States did not extinguish the States' sovereign powers within their own borders. On the contrary, the States "entered the federal system with their sovereignty intact." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). Although the States necessarily subordinated some of their authority to the new federal government, they nonetheless retained "'a residuary and inviolable sovereignty.'" *Printz v. United States*, 521 U.S. 898, 918-19 (1997), quoting The Federalist No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961). *See also Alden*, 527 U.S. at 713-14. As this Court has noted, "the founding document 'specifically recognizes the States as sovereign entities,'" *Alden*, 527 U.S. at 713, quoting *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 71 n.15 (1996), "reserv[ing] to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status," *id.* at 714.

The Tenth Amendment reflects that understanding, expressly declaring that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States

respectively, or to the people." U.S. Const. amend. X. The States' "reserved" powers thus are directly traceable to the powers that the States had originally possessed as independent sovereign nations. "'These powers . . . remain, after the adoption of the constitution, *what they were before*, except so far as they may be abridged by that instrument.'" *Cook v. Gralike*, 531 U.S. 510, 519 (2001), quoting *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819) (emphasis added).

The States' residual sovereignty was not merely ceremonial: it left each State with broad authority over persons and events within its borders. As this Court long ago observed, "the jurisdiction of a state is coextensive with its territory, coextensive with its legislative power." *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 733 (1838) (internal quotations omitted). Thus, "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Printz*, 521 U.S. at 928. That sovereignty necessarily encompasses "the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens," *Duro v. Reina*, 495 U.S. 676, 685 (1990); *see Munaf v. Geren*, 553 U.S. 674, 694-95 (2008).

The right of a sovereign to govern within its own territory, in turn, has important consequences for the relations between States in our federal system. This Court has noted the general rule that "[e]very sovereign has the exclusive right to command within his territory." *Suydam v. Williamson*, 65 U.S. (24 How.) 427, 433 (1860). Conversely, it has acknowledged, again as a general rule, that "[n]o law has any effect, of its own force, beyond the limits of the sovereignty

from which its authority is derived." *Hilton v. Guyot*, 159 U.S. 113, 163 (1895). In light of these fundamental principles, it would be highly unusual for States to invert the traditional rules of sovereignty – surrendering authority over their own territory by allowing other States to disregard local laws – and courts should infer that kind of submissive intent only upon the most unambiguous evidence. As the Court recently observed, "States rarely relinquish their sovereign powers, so when they do we would expect a clear indication of such devolution, not inscrutable silence." *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2133 (2013).

b. That clear indication is lacking here. The Board does not cite a single word showing that, at the time of the Formation, either the Framers or representatives of the States specifically addressed the States' immunity in one another's courts and declared that, contrary to the prevailing rule before the Formation, such immunity would henceforth exist as of right and not as a matter of comity.

The most the Board offers is a collection of broad, highly generalized statements to the effect that sovereigns are not amenable to suit by individuals in any court (with an occasional reference to other States' courts). *See* FTB Br. 31-36. But, despite the stature of speakers like Hamilton and Madison, there are serious problems with relying on such authority in this context. First of all, if those declarations are taken to establish that, in the late 18th Century, sovereigns enjoyed immunity as of right wherever they went, regardless of the home sovereign's consent, that view would mean that *Schooner Exchange*, one of this Court's historic decisions, was in error. Even the Board does not make *that*

argument.[1] Moreover, unlike Chief Justice Marshall's detailed reasoning in *Schooner Exchange*, none of the statements cited by the Board (including Marshall's own, *see* FTB Br. 34) actually discussed whether immunity in another sovereign's courts depended on the consent of the host sovereign. To the extent the Board's cited material fails to undertake the critical "dual sovereign" analysis of *Schooner Exchange*, therefore, the latter is more precise and more persuasive.

Furthermore, and relatedly, the Board does not distinguish between the historical *fact* of sovereign-to-sovereign immunity and the *basis* for that immunity. It is certainly correct that, at the time of the Formation, sovereign nations were expected to, and did, extend immunity to each other as a matter of custom. Thus, Hamilton could properly ground his view of universal sovereign immunity in "the general sense and the general practice of mankind." The Federalist No. 81, at 487. But neither a "general sense" nor a "general practice" of consent-based immunity covertly transforms a host sovereign's voluntary act into an indefeasible right, exercisable without regard to the home sovereign's consent. Custom notwithstanding, a sovereign retains the sovereign power to decide, based upon its own sovereign interests, not to grant further immunity in the future. *See Santissima Trinidad*, 20 U.S. (7 Wheat.) at 353.

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[1] The same problem arises with occasional dicta in decisions of this Court stating that a sovereign can never be sued in the courts of another sovereign. *See* FTB Br. 37-38 (citing cases). If those statements are read to say that sovereigns enjoy immunity as of right in other sovereigns' courts, they are directly at odds with the reasoning of *Schooner Exchange*.

In addition, the contemporary statements cited by the Board were addressed to a very different issue: whether the States would have immunity in the *federal* courts. The language of Article III suggested they might not, and the heavily indebted States, not surprisingly, wanted assurance they would. That question, however, had an unusual twist: although the new United States would be an independent sovereign – and thus traditionally would need to give its consent to any immunity sought by the States – it was a sovereign the States themselves were directly involved in forming. Consequently, the States were in unique position to decide at the time of creation whether they would have the same immunity in the federal courts that they enjoyed in their own courts. That is the question that Hamilton, Madison, and others were actually debating, not the States' immunity in each others' courts.

The Board seems to believe that, because the States sought immunity as of right in the federal courts, they would have demanded it in the courts of other States as well. But the two situations are not the same. The comity-based custom of immunity among independent nations was grounded in, and traditionally depended on, the equal stature of the various sovereigns. Although comity is ultimately a matter of grace and discretion, *see* pages 50-52, *infra*, it has proved effective over the centuries because it is backed by each sovereign's powerful regard for mutuality and "reciprocal self-interest." *National City Bank of New York v. Republic of China*, 348 U.S. 356, 362 (1955). In practical terms, each sovereign has a strong incentive to grant immunity to other similarly situated sovereigns in order to secure a corresponding grant of immunity when the roles are reversed. That do-unto-others principle governed the relations

among the States both as independent nations and, subsequently, as equal sovereigns within the newly formed United States.

That same state of equilibrium did not exist, however, between the States and the new federal government. Quite the opposite, in fact. Under traditional principles of sovereign immunity, the federal government (a superior sovereign) would be entitled to immunity as of right in the courts of the States (inferior sovereigns). Given that hierarchy, the United States had no reason to be concerned that, if it denied immunity to the States, they would respond by denying immunity in return, and the States could not readily assume that federal courts would follow the practice among equal sovereigns of granting immunity as a matter of comity. The States thus sought the same immunity – immunity as of right – that they had in their own courts.[2]

The Board tries to turn the Framers' silence regarding state-to-state immunity into a positive, suggesting that the right to immunity among sovereigns was "'too obvious to deserve mention.'" FTB Br. 40, quoting *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting). That argument just ducks the pivotal question: whether nation-to-nation – and hence state-to-state – immunity was a matter of comity or of absolute privilege. Because it was the accepted custom that sovereigns would voluntarily extend immunity to one another under the doctrine of

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[2] Insofar as the *federal* government was concerned, moreover, a State did not have "exclusive and absolute" jurisdiction over its territory. *See Schooner Exchange*, 11 U.S. (7 Cranch) at 136. Thus, the usual rules of consent-based immunity – which depended on principles of territorial autonomy – would not naturally apply.

comity, it was undoubtedly the assumption, especially after the decision in *Nathan*, that the States would do so as well. It is one thing, however, for the States to expect immunity as a matter of comity, quite another for them to replace that voluntary practice with binding law. *See, e.g., Altmann*, 541 U.S. at 694-95 (distinguishing "a justifiable expectation [of immunity] as a matter of comity" from a "'right' to such immunity").

To be sure, every sovereign *prefers* to have immunity in other sovereigns' courts, provided that the immunity comes without cost. But immunity between sovereigns is a two-way street. As the Court made clear in *Schooner Exchange*, the act of granting immunity to another sovereign inevitably means that the home sovereign is yielding control over persons and events within its territory. *See* 11 U.S. (7 Cranch) at 136 (discussing "diminution of [home nation's] sovereignty"). Thus, to gain immunity in other States, each State must give up sovereignty in return. That trade-off may or may not be one worth making, but the Board offers no historical evidence to demonstrate the States affirmatively chose to make it.

It has been argued (though not by the Board or its *amici*) that the grant of Judicial Power in Article III – extending jurisdiction over "Cases . . . between a State and Citizens of another State" – extinguished the States' preexisting power to deny immunity to other States. *See* Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249 (2006). According to this theory, formation of the Union "meant that future development of interstate immunity law would occur in the Supreme Court and was no longer left primarily to state decision makers." *Id.*

at 262. But this explanation is based on just the kind of inference by "inscrutable silence" that the Court has warned against. *See Tarrant Reg'l Water Dist.*, 133 S. Ct. at 2133. Article III does not explicitly oust the state courts of jurisdiction over citizen-State cases, and implicit displacement of state jurisdiction would necessarily follow only if this Court's jurisdiction were *exclusive*. By its plain terms, however, Article III does not provide for exclusive jurisdiction in citizen-State cases.

The theory is also incomplete. The central question is not whether this Court could apply federal "interstate immunity law" requiring States to give each other immunity, but whether there *is* such federal law. The answer is no. Whether examined at the time of the Formation or in the years since, federal law has had nothing to say about the States' immunity in each others' courts. In particular, while the Eleventh Amendment confirmed that the States had immunity as of right in the federal courts, and left untouched the States' preexisting immunity in their own courts, *see Alden*, 527 U.S. at 712-30, it did not address, much less purport to overturn, the historical principle that immunity among equal sovereigns depends on consent of the home sovereign.

In short, the Board cannot show what it needs to show: that the States have immunity as of right in the courts of other States. At most, it has shown that, like sovereign nations in general, States have granted immunity to each other as a matter of custom. *See id.* at 749 (noting that "the immunity of one sovereign in the courts of another has often depended in part on comity or agreement"). That is not enough. Furthermore, assuming that a sovereign must give prior notice before departing from that custom – as

Schooner Exchange suggested, *see* 11 U.S. (7 Cranch) at 137 – the Board cannot show lack of notice either. Well before the events in this case, the Nevada Supreme Court made clear that other States could not expect to receive absolute sovereign immunity in Nevada's courts as a matter of comity. *See Mianecki v. Second Judicial Dist. Court*, 658 P.2d 422 (Nev. 1983).[3] Thus, the Board's attempt to claim immunity as of right in Nevada's courts falls short on all fronts.

B. This Court Should Adhere to the Holding of *Nevada v. Hall* as a Matter of Stare Decisis.

Even if the historical evidence were less compelling, principles of stare decisis should lead to the same conclusion: States do not have immunity as of right in the courts of other States. The Court said so in *Hall*, and the Board provides no good reason for overruling that decision now.

1. Respect for Precedent Is Central to the Rule of Law.

"Time and time again, this Court has recognized that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991), quoting *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987) (plurality). Indeed, just last Term, this Court reemphasized that "[o]verruling precedent is never a small matter. *Stare decisis* . . . is 'a foundation stone of the rule of law.'" *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409

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[3] That view of immunity can hardly have surprised California agencies, given that the California Supreme Court had previously held that other States enjoyed no immunity as of right in the California courts. *See Hall v. University of Nevada*, 503 P.2d 1363 (Cal. 1972).

(2015), quoting *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014).

The principles of stare decisis are important as both an institutional and a practical matter. As the Court has noted, stare decisis "'promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Id.*, quoting *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991). *See also Hilton*, 502 U.S. at 202 ("Adherence to precedent promotes stability, predictability, and respect for judicial authority."). In particular, the doctrine "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986).

Stare decisis also allows the Court to develop a body of settled law without the need for perpetual reexamination. As Justice (then-Judge) Cardozo once noted, "[t]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." Benjamin N. Cardozo, *The Nature of the Judicial Process* 149 (1921). Stare decisis provides an essential buffer against that prospect, "reduc[ing] incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation." *Kimble*, 135 S. Ct. at 2409.

The Court thus has set a demanding standard for overruling its prior decisions. "[A]n argument that

we got something wrong – even a good argument to that effect – cannot by itself justify scrapping settled precedent." *Id.* Rather, "[t]o reverse course, we require as well what we have termed a 'special justification' – over and above the belief 'that the precedent was wrongly decided.' *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014)." *Id.* (parallel citation omitted). *See also Hilton*, 502 U.S. at 202. The Board has not come close to showing a "special justification" here.

2. The Board Has Failed To Show a "Special Justification" for Overruling *Nevada v. Hall*.

The Board's attack on *Hall* – and its corresponding plea to set aside stare decisis – suffers from numerous problems. We have already discussed the fact that the Board's analysis depends upon a false premise, i.e., that States had immunity as of right in courts of other States prior to formation of the Union. *See* pages 16-31, *supra*. The Court in *Hall* correctly recognized the fact that, as independent nations, States enjoyed immunity only as a matter of comity, basing its decision on Chief Justice Marshall's thoughtful analysis in *Schooner Exchange*. *See* 440 U.S. at 416-17. As a result, *Hall* was not "wrongly decided" at all.

The Board also fails to deal with *Hall* squarely. Given the importance of stare decisis to development of the law, it seems remarkable that a litigant would urge the overruling of a prior decision as "[p]oorly [r]easoned," FTB Br. 26, without attempting to rebut the principal authority on which that decision rested. But the Board accomplishes that feat, indeed goes it one better, by not even *mentioning* this Court's holding in *Schooner Exchange*. By neglecting to

address *Hall*'s reasoning on its own terms, the Board is hardly in good position to criticize the *Hall* opinion as "difficult to fathom." *Id.* at 29.[4]

In any case, the Board brings forth little that is new. Most of the Board's arguments – and the bulk of its historical material – were previously considered in *Hall*. Indeed, the Board's submission here bears a striking resemblance to Justice Rehnquist's dissent in *Hall*. Again and again, the Board puts emphasis on the same case citations and statements by the Framers – in particular, those of Hamilton, Madison, and Marshall – that Justice Rehnquist featured in his dissenting opinion. *Compare* FTB Br. 33-34 (Hamilton) and *Hall*, 440 U.S. at 436 (Rehnquist, J., dissenting) (same); FTB Br. 34 (Madison) and 440 U.S. at 436 n.3 (same); FTB Br. 34 (Marshall) and 440 U.S. at 436 n.3 (same); FTB Br. 30-31 (*Nathan v. Virginia*) and 440 U.S. at 435 (same); FTB Br. 37 (*Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858)) and 440 U.S. at 437 (same); FTB Br. 37 (*Cunningham v. Macon & B.R.R. Co.*, 109 U.S. 446, 451 (1883)) and 440 U.S. at 437-38 (same); FTB Br. 38 (*Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 80 (1961)) and 440 U.S. at 438 (same); FTB Br. 37-38 (*Hans v. Louisiana*) and 440 U.S. at 439-40 (same). This Court already denied one petition for rehearing in *Hall*, *see* 441 U.S. 917 (1979), and, in its current filing, the Board is essentially asking the Court just to reshuffle the deck.

Apart from the repetitive historical material, the Board relies heavily on various sovereign immunity

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[4] Justice Blackmun, in his *Hall* dissent (joined by Chief Justice Burger and Justice Rehnquist), saw no such difficulty, calling the Court's work a "plausible opinion." 440 U.S. at 427 (Blackmun, J., dissenting).

decisions since *Hall*. *See* FTB Br. 42-50 (discussing cases). Contrary to the Board's apparent view, however, the lesson of those cases is not that States always have sovereign immunity everywhere but that the States' right to sovereign immunity derives from its historical origins. *See, e.g.*, *Alden*, 527 U.S. at 712-30; *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751-61 (2002). Thus, in examining the States' immunity in each others' courts – a situation that "'necessarily implicates the power and authority of a second sovereign,'" *Alden*, 527 U.S. at 738, quoting *Hall*, 440 U.S. at 416 – it is critical to look at the specific history identifying, and properly explaining, how immunity among independent sovereigns was established. None of the post-*Hall* decisions explored that history, for the simple reason that the Court was addressing quite different questions about the States' immunity in federal tribunals and their own courts. Indeed, none of the decisions addressing the States' immunity so much as refers to *Schooner Exchange*, the landmark decision regarding one sovereign's immunity in an equal sovereign's courts.

The Board likewise fails to show that *Hall* has led to serious financial consequences for the States. Although Justice Blackmun feared that the Court's decision would "open[] the door to avenues of liability and interstate retaliation that will prove unsettling and upsetting for our federal system," 440 U.S. at 427 (Blackmun, J., dissenting), no such upheaval has taken place. Suits against States in state courts – rare before the decision in *Hall* – remain few and far between. Furthermore, in those infrequent instances when such suits have been filed, state courts have commonly relied on the doctrine of comity to extend broad protections to their sister States, as the Nevada

Supreme Court did here. *See, e.g.*, *Cox v. Roach*, 723 S.E.2d 340, 346 (N.C. Ct. App. 2012); *Greenwell v. Davis*, 180 S.W.3d 287, 297 (Tex. Ct. App. 2005).

There have been no dramatic political repercussions either. To state the obvious, the decision in *Hall* hardly provoked a *Chisholm*-like reaction.[5] *See Alden*, 527 U.S. at 720 (*Chisholm* "decision fell upon the country with a profound shock") (internal quotations omitted). Apart from filing a few *amicus* briefs saying that *Hall* should be overruled, the States have taken no active measures since *Hall* to obtain greater immunity in other States' courts. Indeed, the Board itself was so unconcerned about the *Hall* decision that it did not bother to challenge it on its first trip to this Court, *see Hyatt I*, 538 U.S. at 497, and then largely disclaimed opposition to it at oral argument, JA177-79. This steadfastly passive approach strongly suggests that immunity as of right in other States' courts is of little importance to effective operation of state governments.

The Board suggests that stare decisis should apply less vigorously because *Hall* was a "constitutional decision." FTB Br. 56. But that argument is conspicuously out of place in this context. The usual reason that constitutional decisions are subject to more liberal reexamination – that only this Court can undo the consequences of its prior decision (*see, e.g.*, *United States v. Scott*, 437 U.S. 82, 101 (1978)) – does not apply to a ruling that allows the political branches, both state and federal, to alter the decision at will. Here, that door is wide open. As we discuss next, nothing in *Hall* prevents the States from agreeing to provide immunity in each others' courts or from

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[5] *See Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

asking Congress to require such immunity. Although stare decisis is not an "inexorable command," *Payne*, 501 U.S. at 827-28, the States' own inertia is not a substantial reason for setting it aside.

3. States Can Achieve Their Objective of Reciprocal Immunity Through Voluntary Agreements and Other Political Means.

The Board rests much of its anti-stare decisis argument on dire speculation that, absent full immunity, state courts will subject their sister States to widespread, large-dollar judgments. The Board does not cite any real-life examples of such judgments – apart from the lower court decision here, which was almost totally reversed by the Nevada Supreme Court – so the Board is left to mount a generalized assault on the effectiveness of comity principles. *See* FTB Br. 55-56. Even on its own terms, that attack is open to considerable doubt: after all, civilized nations have relied on the doctrine of comity for hundreds of years. But, putting comity aside for the moment, it is clear that the States have other more expedient, and effective, ways to obtain the immunity they seek.

The most obvious solution to the States' claimed problem is for the States to enter into bilateral or multilateral agreements to provide immunity in each others' courts. For example, the only two state-to-state immunity cases reaching this Court have involved lawsuits in the neighboring States of California and Nevada, both of which now claim to support absolute immunity as of right in state courts. *See* West Virginia et al. Br. 2-32 (joined by Nevada). If that is what California and Nevada are truly seeking, it should be a relatively simple matter for the two States to achieve that end by mutual agreement.

The States need not, however, proceed two by two in order to gain greater immunity. The *amicus* briefs in this case indicate that as many as 45 States believe that States should have immunity as of right in each others' courts. *See id.*; South Carolina State Ports Authority Br. 2-21. That goal, however, lies entirely within their own reach. If the States are willing to exchange part of their sovereignty at home for broadened immunity in other States, they can enter into a single expansive agreement making mutually binding commitments to that effect. And, as a not insignificant side-benefit, that process of open give-and-take would allow all branches of state government (as well as affected citizens) to be involved in deciding whether States should part with a portion of their internal sovereignty in order to obtain greater immunity outside their borders.

Such voluntary agreements among the States are not only permitted but specifically contemplated. The Constitution, of course, expressly provides for compacts and agreements through which the States, with the approval of Congress, can advance their shared interests. *See* U.S. Const. art. I, § 10, cl. 3. But the States are also free to enter into agreements without congressional approval. As this Court has noted, "[w]here an agreement is not 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States,' it does not fall within the scope of the [Compact] Clause and will not be invalidated for lack of congressional consent." *Cuyler v. Adams*, 449 U.S. 433, 440 (1981), quoting *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 468 (1978).

Applying that standard, there is no reason that Congress would need to approve an agreement among the States granting themselves immunity in each others' courts. Agreements among States to provide reciprocal immunity would not "interfere with the just supremacy of the United States." *Id.* (internal quotations omitted). If anything, the effect would be the reverse. Rather than expanding the collective power of the States, the agreements would *reduce* each signatory State's sovereignty in return for expanded immunity. That is just the kind of state-to-state readjustment that can, and should, be left to the States themselves.

Equally important, discussions among the States would not be limited to addressing immunity on an all-or-nothing basis. In asking this Court to overrule *Hall*, the Board is seeking a ruling that would give every State total immunity as a matter of right, regardless of the nature of the defendant State's actions and regardless of the impact on the home State's sovereignty. That is an extraordinary proposal. By taking up the question themselves, however, the States could tailor the terms of voluntary agreements to extend as much or as little immunity as they deemed appropriate. For instance, the States could agree to grant immunity for all acts by other States – including commercial activities – or provide immunity just for certain kinds of governmental actions. Or the States could decide to allow specified suits against themselves but impose a ceiling on recoverable damages.

It is striking, in fact, that the Board is asking this Court to impose the kind of sweeping immunity that is all but obsolete among sovereigns in modern times. For example, the United States – which once extend-

ed almost complete immunity to foreign sovereigns – has substantially narrowed its grant of immunity to reflect current circumstances. In keeping with that revised approach, the Foreign Sovereign Immunities Act first sets forth a broad grant of immunity but then carves out significant exceptions for commercial activities and torts, as well as certain acts of terrorism. *See, e.g.*, 28 U.S.C. § 1605(a)(2) (commercial activities), (a)(5) (tortious acts and omissions); *id.* § 1605A(a)(1) (acts of terrorism).

The States, however, are asking this Court for much more: immunity that would allow them to enter another State and do as they please without being held to account under that State's laws. If that immunity had been in place years ago, it would have meant that the plaintiffs in *Hall* – who were severely injured by a Nevada official driving in California (440 U.S. at 411) – would have been left to bear their injuries without any redress at all, even though California law expressly entitled them to compensation. And, on a going-forward basis, state officials would apparently be free to target citizens in other States for physical assaults, to invade their privacy, or to destroy their property, without giving any regard to state laws providing relief for those destructive acts.

Given the potentially drastic consequences of total immunity, it seems far from certain that the States, if they entered into voluntary agreements, would actually abandon all their authority to accord relief to their citizens. Be that as it may, however, the process of negotiating voluntary agreements would at least allow the States to confront the question for themselves, rather than simply accept a one-size-fits-all solution handed down by this Court. That is a far better course than the overruling of a decision that

has led to little practical difficulty and that was, in fact, entirely correct.

4. Congress Can Legislate To Provide the States with Expanded Immunity.

The States have other means of gaining immunity as well. In particular, the second sentence of the Full Faith and Credit Clause contains an express grant of power to Congress to declare the "effect" of public acts in state courts. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 729 (1988). If the States elected to do so, therefore, they could seek federal legislation directing States to apply the immunity laws of their sister States, the ruling that the Board unsuccessfully sought, as a constitutional matter, in *Hyatt I*. As the national legislative body, Congress would be well-positioned to consider the competing interests of all States, including (but not limited to) the interest of defendant States in avoiding burdens on their government operations. *See generally Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Moreover, unlike a constitutional holding that would freeze the rights of both forum and defendant States, any congressional legislation addressing inter-State immunity could thereafter be amended, if and when circumstances so dictated.

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In short, the States have shown no entitlement to immunity as of right in the courts of other States. The Board's claim is unsupported by history and blocked by the decision in *Hall*. The Court should again reject the Board's request to elevate its sovereignty over the sovereignty of its sister State.

II. Neither the Full Faith and Credit Clause nor Principles of Comity Require Nevada's Courts To Apply California Law, in Whole or in Part, to a Matter About Which Nevada Is Competent To Legislate.

The Board's alternative argument is that, by declining to apply Nevada's cap on compensatory damages in this case, the Nevada Supreme Court violated the Full Faith and Credit Clause and principles of comity. According to the Board, the Nevada courts were obliged to apply the damages cap to California officials as a matter of "equal treatment." FTB Br. 17-25. But, however useful the idea of equal treatment may be as a "benchmark" for dealing with other sovereigns, *Hyatt I*, 538 U.S. at 499, there is no provision of federal law requiring it. Indeed, the Board is unable to identify *any* recognized legal basis for its theory, relying almost entirely on an over-reading of two passing remarks by this Court in *Hyatt I* and a thoroughly inapt invocation of the term "equal sovereignty." That sparse authority is nowhere near enough to justify the unprecedented ruling that the Board seeks.

A. The Full Faith and Credit Clause Allows Nevada To Apply Its Own Law to This Suit.

1. States May Apply Their Own Law to Matters About Which They Are Competent To Legislate.

This Court has made clear that the Full Faith and Credit Clause places only modest restrictions on the States' authority to apply their own laws to lawsuits in their courts. "Whereas the full faith and credit command 'is exacting' with respect to '[a] final judgment . . . rendered by a court with adjudicatory authority over the subject matter and persons governed

by the judgment,' it is less demanding with respect to choice of laws." *Hyatt I*, 538 U.S. at 494, quoting *Baker ex rel. Thomas v. General Motors Corp.*, 522 U.S. 222, 233 (1998) (citation omitted; alterations in original). The Board's efforts to rewrite that principle were found wanting before, *see id.* at 495-99, and are no more impressive now.

The governing rule regarding choice of law under the Full Faith and Credit Clause is simple and straightforward: a State may apply its own laws to "'a subject matter concerning which it is competent to legislate.'" *Id.* at 494, quoting *Sun Oil*, 486 U.S. at 722; *Baker*, 522 U.S. at 232. Thus, to determine whether a state court applying its own law has acted within constitutional bounds, the Court need ask only whether the State had legislative jurisdiction over the subject matter of the lawsuit. The Court, of course, has already answered that question in this case. In *Hyatt I*, the Court specifically found that Nevada was "competent to legislate" with respect to the torts in question. *See* 538 U.S. at 494.

The Nevada courts were thus constitutionally entitled to apply Nevada law to this case. By its plain terms, Nevada law provides no immunity – total or partial – for a foreign sovereign, leaving such immunity to be decided on a case-by-case basis as a matter of comity. Nevada does impose a cap on damage awards against *Nevada* officials, *see* Nev. Rev. Stat. § 41.035(1), but that cap is a condition on Nevada's waiver of sovereign immunity in its own courts and clearly does not apply to officials of other States. Application of Nevada law thus provides no immunity to the Board.

Faced with this obstacle, the Board suggests that the Nevada damages cap is unconstitutional if it

applies to Nevada officials but not to officials of other States. *See* FTB Br. 44. But the Board offers no credible authority for that proposition. Its purported legal support consists of one Commerce Clause case, *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), that, to say the least, has nothing to do with the scope of immunity among sovereigns. And, insofar as the Board is relying on the concept of "equal sovereignty," its argument runs directly counter to cases making clear that the States do not have "equal" sovereign powers in the territories of other States. *See* pages 52-54, *infra*.

2. The Board's Attempt To Add a "No Hostility" Requirement to the Constitutional Test Is Unsupported and Unwarranted.

The finding that Nevada has legislative jurisdiction should be the end of the constitutional inquiry under the Full Faith and Credit Clause. Although the Board advances a jerry-built argument based on a mixture of Nevada and California law – saying that Nevada had to apply *California's* law of absolute immunity above the amount of *Nevada's* cap on damages for *Nevada* officials – that argument falls at the first hurdle because it ignores the dispositive Full Faith and Credit Clause standard. Given that Nevada is "competent to legislate" with respect to the subject matter of this lawsuit, *Hyatt I*, 538 U.S. at 494, the Clause does not require its courts to apply California law at all, let alone a non-existent California law designed to mirror an inapplicable Nevada law.

The Board nonetheless argues that Nevada, in making its choice-of-law decision, cannot exhibit "hostility" to California law. FTB Br. 21-22. But this argument has its own defects. To start with, it

cannot be "hostile" for a State to do nothing more than apply its own law to a matter over which it has legislative jurisdiction: that is precisely what the Constitution allows it to do. As this Court has said, "the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939); *see Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 436 (1943) ("each of the states of the Union has constitutional authority to make its own law with respect to persons and events within its borders").

The Board's two-step inquiry would also entangle the Court in endless, time-consuming inquiries regarding application of a State's own law. Instead of just conducting the uncomplicated inquiry now required by the Full Faith and Credit Clause – i.e., "does the forum State have legislative jurisdiction?" – the Court would need to undertake a second constitutional inquiry to decide whether a state court's otherwise permissible decision to apply its law should be regarded as "hostile" to the law of another State (something that aggrieved litigants will routinely claim). In every case, therefore, the Court would have to examine the law of two or more States and try to determine whether the home forum had overstepped some unidentified bounds of "hostility" in choosing its own law. That inquiry, by its very nature, would be largely standardless and, even more important, untethered to any recognized principles of full faith and credit.

To make matters worse, it is all but certain that the end result of applying an expansive, ill-defined "hostility" test would be a return to the long-abandoned days of "weighing" competing state interests. After all, the underlying premise of the Board's proposal is that this Court should promote California's interest in claiming immunity over Nevada's interest in compensating its injured residents. There is no principled way to measure those kinds of competing state interests, and the Court sensibly ended its efforts to do so. *See Pacific Employers*, 306 U.S. at 501 (limiting *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1932), to its facts). As the Court observed in this very case, "the question of which sovereign interest should be deemed more weighty is not one that can be easily answered. Yet petitioner's rule would elevate California's sovereignty interests above those of Nevada." *Hyatt I*, 538 U.S. at 498.

To support its "no hostility" requirement, the Board relies on a single case, *Carroll v. Lanza*, 349 U.S. 408 (1955), cited (though not actually discussed) in *Hyatt I*. *Carroll* offers no help to the Board, however, because the Court in that case specifically found that "Arkansas, the State of the forum, [was] *not* adopting any policy of hostility to the public Acts of Missouri." *Id.* at 413 (emphasis added). Rather, as the Court observed, the State was simply "choosing to apply its own rule of law to give affirmative relief for an action arising within its borders." *Id.* That, of course, is exactly what happened in this case: Nevada, the forum State, "cho[se] to apply its own rule of law to give affirmative relief for an action arising within its borders." The holding of *Carroll* makes clear, therefore, that a forum's basic choice of

its own law is not a hostile action in any constitutionally meaningful sense.[6]

In any event, it goes well beyond exaggeration to say that the Nevada courts exhibited hostility to California law or, for that matter, to California as a sovereign. *See* FTB Br. 23 (decision below "clearly failed to display a 'healthy regard for California's sovereign status'"), quoting *Hyatt I*, 538 U.S. at 499. Although the Nevada Supreme Court did not grant every conceivable wish that the Board had, it still went to great lengths to respect the dignity of its neighboring State. Far from treating the Board "just as any other litigant," *Hall*, 440 U.S. at 427 (Blackmun. J., dissenting), the court applied traditional principles of comity to shield the Board from a wide range of liability that non-sovereign defendants would have faced for the same conduct. In particular, the court applied California law to give the Board absolute immunity for its negligent acts and to free it from any obligation to pay punitive damages – while also barring interference with the California tax proceedings – precisely because of its status as a co-equal sovereign. *See* JA168 (negligence); Pet. App. 65 (punitive damages); *id.* at 53-57 (non-interference).

Furthermore, in the one instance where the Nevada court departed from the "benchmark" of liability for

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[6] The Court in *Carroll* distinguished two earlier cases, neither of which involved the basic choice-of-law question, i.e., what substantive law should govern the rights of the respective parties. Rather, both decisions involved situations "where the State of the forum [sought] to exclude from its courts actions arising under a foreign statute." 349 U.S. at 413. As a result, the state courts were not simply applying their own "rule[s] of law" to the events at issue, but were closing their courthouses to foreign causes of action entirely. Nothing of the sort occurred here.

Nevada officials, it specifically explained why granting the immunity sought by the Board would undermine Nevada's interest in protecting its residents from deliberate attacks by other sovereigns. The court noted that, unlike officials from other States, Nevada officials "'are subject to legislative control, administrative oversight, and public accountability'" in Nevada. Pet. App. 45, quoting *Faulkner v. University of Tennessee*, 627 So. 2d 362, 366 (Ala. 1992). *See, e.g.*, Nev. Rev. Stat. § 284.385(1)(a) (authorizing dismissal or demotion of employees for "the good of the public service"); Nev. Admin. Code § 284.650(1), (4) (authorizing discipline for "[a]ctivity which is incompatible with an employee's conditions of employment" and for "[d]iscourteous treatment of the public . . . while on duty"). As a result, it noted, "'[a]ctions taken by an agency or instrumentality of this state are subject always to the will of the democratic process in [Nevada],'" while there is no comparable safeguard against state officials that "'operate[] outside such controls in this State.'" Pet. App. 45, quoting *Faulkner*, 627 So. 2d at 366.

The Board does not challenge this analysis as a factual matter, nor could it reasonably do so. Nevada obviously has no control over the hiring and training of California tax officials, and it had no ability to rein in those officials once they embarked upon an offensive, bias-tainted campaign to "get" a Nevada resident. And, while the Board claims that Nevada has no legitimate interest in deterring its misconduct – asserting that "exercising control over non-Nevada government actions is hardly a constitutionally valid objective" (FTB Br. 24) – that argument just reflects the Board's self-centered view of state sovereignty. What California does with respect to its own citizens

within its own territory is concededly not a matter of concern to Nevada, but the injuries in this case occurred precisely because California did *not* confine its unlawful acts to its own territory. Instead, it reached into Nevada in order to commit intentional torts against a Nevada citizen, actions that constituted a direct intrusion on Nevada's interests as an independent sovereign. [7]

Finally, we note the Alice-in-Wonderland quality of the Board's attempt to invoke Nevada's damages cap for Nevada officials. It may be recalled that, when the shoe was on the other foot in *Hall*, Nevada officials sought protection under the same Nevada law in the California courts, only to be told that California would not apply it. *See Hall*, 440 U.S. at 412-13 (discussing California proceedings). As a result, Nevada officials were exposed to unlimited damages in California for a claim of negligence. Here, of course, Nevada accorded the Board complete immunity against negligence claims as a matter of comity, and the Board finds itself liable for damages only because it went well beyond the bounds of simple negligence and undertook a calculated campaign aimed at harming a Nevada resident.

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[7] Although the Board complains that "the Nevada jury below was happy to side with a fellow Nevadan," FTB Br. 52, one hardly needs to be a Nevada citizen to be troubled by tax officials who announce an intent to "get that Jew bastard," become "obsessed" with that goal, create an entire "fiction" about the taxpayer, and try to use his legitimate concerns about privacy to force him into a settlement. *See* pages 3-4, *supra*. Of course, we cannot know how a California jury would feel about the same conduct – assuming that the Board would treat in-state taxpayers the same way – because the Board has absolute immunity in its home State.

Given these circumstances, the Board's demand for even greater immunity is particularly unjustified.

B. There Is No Federal Law Dictating What State Courts May Do as a Matter of Comity.

The Board also argues that the Nevada courts were required to apply California's law of immunity (above the amount of the Nevada damages cap) as a matter of comity. But the Board cites no case in which this Court has ordered a state court to grant comity to another State. That omission is hardly coincidental. As this Court has observed, "'[t]he comity . . . extended to other nations is no impeachment of sovereignty. It is the *voluntary act* of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests.'" *Hilton*, 159 U.S. at 165-66, quoting *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 589 (1839) (emphasis added). Given the voluntary nature of comity, it remains within the discretion of a forum sovereign to decide whether to grant comity to another sovereign and, if so, to what extent.

Disregarding this basic principle, the Board asks the Court to oversee state courts' application of comity to other States, in order to assure that the doctrine is being "'sensitively'" applied. FTB Br. 22, quoting *Hyatt I*, 538 U.S. at 499. This call for expanded *federal* supervision is an especially odd request from the Board, given that it purports to be trumpeting the cause of *state* sovereignty. Whatever the exact contours of state sovereignty may be, they are obviously diminished by transferring final decisionmaking authority from state courts to federal courts. In any event, however, the Board presents no legal basis for the notion that federal courts can tell

state courts how to make their comity decisions, presumably because no one has ever viewed the role of the federal courts as encompassing a power to mandate what States may do under the voluntary doctrine of state-to-state comity.[8]

That fundamental understanding was not altered by this Court's observation in *Hyatt I* that the Nevada Supreme Court had "sensitively" applied principles of comity to this case. 538 U.S. at 499. In *Hyatt I*, the Board had complained about the refusal of the Nevada Supreme Court to accord it full immunity, and this Court merely pointed out that the state court had gone out of its way to treat the Board as a true sovereign. That passing, and entirely correct, observation is hardly enough to launch a counter-intuitive "mandatory comity" doctrine that would override centuries of established law.

It is true, of course, that some provisions of the Constitution make mandatory what, prior to formation of the Union, was simply a matter of comity. For example, the Full Faith and Credit Clause unquestionably imposed enforceable obligations on the States, requiring them to honor the judgments of other States and, to a very limited extent, to apply other States' laws. *See Baker*, 522

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[8] The Board claims that respondent himself endorsed a link between comity and mandatory equal treatment. *See* FTB Br. 18. It is thus worth pointing out that, during oral argument in *Hyatt I*, counsel for respondent stated no fewer than *five* times that there are no enforceable principles of federal law requiring state courts to give equal treatment to other States. *See* JA180 ("I don't think there is a federally enforceable law of state comity"), 186 ("just a matter [of comity]"; "not federal [sic] enforceable"), 187 ("there's no federally enforceable state law of comity"; rejecting suggestion of "federal component" for state-to-state comity).

U.S. at 232 (noting that the "animating purpose of the full faith and credit command" was to make the States "integral parts of a single nation") (internal quotations omitted). As we have just discussed, however, the Full Faith and Credit Clause does not require Nevada to apply California's immunity laws here. *See* pages 42-50, *supra*. It would be highly anomalous, therefore, for this Court to impose a binding choice-of-law obligation under the doctrine of comity when a constitutional provision directly addressing that very question imposes no such duty.

The Privileges and Immunities Clause likewise places limits on the States' authority to act as independent sovereigns. But the plain language of that Clause rules out its application here. The Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States," U.S. Const. art. IV, § 2, cl. 1, and the States themselves are not "Citizens" of a State. As the sovereigns they are, the States must rely on voluntary principles of comity instead.

C. The Board's "Equal Sovereignty" Argument Rests Upon a Misunderstanding of Equal Sovereignty.

Finally, the Board tries to support its claim to equal treatment by invoking the concept of "equal sovereignty." But its argument totally misconstrues the import of that term. The fact that the States are equal sovereigns does not mean that a State has the same sovereign authority within the territory of another State as the latter State does. Rather, it means that each State has the same sovereign powers within *its* borders as other States have within *their* borders. The States' sovereignty is equal, but it is not overlapping.

The cases cited by the Board make that distinction very clear. In *Coyle v. Smith*, 221 U.S. 559 (1911), the Court relied upon principles of equal sovereignty to hold that Oklahoma had the right to determine the location of its state capital. But no one would think that Oklahoma has a voice, let alone an equal voice, in choosing the state capital of Kansas or Arkansas. Similarly, in *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012), the Court recognized that, under the equal-footing doctrine, Montana owned title to the riverbeds within its territory. Again, however, it would make little sense – indeed would turn the reasoning of *PPL Montana* on its head – to conclude that Montana has an equal right to riverbeds in other States.[9]

Even as a matter of pure policy, a strict equal-treatment-from-equal-sovereignty theory would have notable shortcomings. In particular, it would often lead to very *unequal* treatment between different States. Thus, if State A extends no immunity to its officials, while State B grants its officials complete immunity, the Board's "equal treatment" theory would mean that State B's officials would face unlimited liability in State A, even though State A's officials would have no liability whatsoever in State B. That lopsided result hardly fits the picture of perfect equality that the Board claims to be advancing.

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[9] The primacy of each State's sovereignty within its territory is reflected in various longstanding state practices. To take one example, most States exempt income from their own bonds from taxation, while levying taxes on income from bonds issued by other States. *See Department of Revenue of Kentucky v. Davis*, 553 U.S. 328 (2008); *Bonaparte v. Tax Court*, 104 U.S. 592 (1882).

In sum, nothing in federal law provides a basis for recasting the traditional law of state-to-state comity. The Nevada Supreme Court gave full consideration to the Board's status as the agency of a separate sovereign, and it applied principles of comity to grant the Board extensive protection. The Board may be unhappy that it did not get even more, but that grievance is not one of constitutional dimension.

CONCLUSION

The judgment of the Nevada Supreme Court should be affirmed.

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October 23, 2015